

October 1, 2003

Mr. Joe Karkoski  
Senior Water Resources Control Engineer  
Central Valley Region, Water Quality Control Board  
3443 Routier Road, Suite A  
Sacramento, California 95827-3003

Dear Mr. Karkoski:

The California Plant Health Association submits the following comments on the Draft Final Staff Report for *Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Orchard Pesticide Runoff and Diazinon Runoff into the Sacramento and Feather Rivers*. The California Plant Health Association (CPHA) represents the interests of fertilizer and crop protection manufacturers, distributors, formulators and retailers in California, Arizona and Hawaii. CPHA members market commercial fertilizers, soil amendments, agricultural minerals and crop protection products. More than 90 percent of all fertilizer and crop protection companies are represented by CPHA.

CPHA submitted comments on the public review draft released earlier this year. Since most of CPHA's comments and concerns were not addressed in the revisions to the Draft Final version of the Basin Plan amendment and the corresponding total maximum daily load (TMDL), we renew our earlier comments and concerns and have attached those comments for inclusion in the final record. In addition to our earlier comments, CPHA submits the following comments that were not submitted previously or that respond to changes in the proposed Basin Plan Amendment. CPHA attempts to use the format as suggested and recommended by the Central Valley Regional Water Board staff (Regional Board). CPHA also supports the comments submitted by Makhteshim-Agan of North America.

**COMMENTS:**

1. *The draft final staff report (DFSR) fails to acknowledge that declining trends in diazinon use are probably the result of changes in regulatory pesticide use requirements, industry educational efforts, increased grower awareness and changes to grower cultural practices.*

The Regional Board tries to make the case that crop value correlates to diazinon use. The Regional Board's correlation is not proper nor is it supported by the Regional Board's own analysis, which requires two years of information to be excluded in order for its

theory to work. Instead of trying to correlate crop value to diazinon use, the Regional Board should have documented the number of applications and the pounds of diazinon used as compared to educational programs conducted by the University of California and relevant commodity organizations. For example, the use of diazinon for almond production over a ten year period clearly shows that the use of diazinon is declining.

Year	# of Applications	Approx. lbs. Active Ingredient
1990	2956	273,000
1991	2320	159,600
1992	3480	315,163
1993	3522	325,000
1994	2958	261,000
1995	1842	235,000
1996	1917	175,000
1997	999	115,000
1998	1071	115,000
1999	1129	125,000
2000	471	62,000

See generally, UC Davis Statewide Integrated Pest Management Program, California Pesticide Use Summaries, <http://www.ipm.ucdavis.edu/PUSE/prepared.html>.

In 1999, there were only 1,129 applications of diazinon to almonds statewide, involving a total of roughly 125,000 pounds of active ingredient. This is 2,393 fewer applications than were made in 1993, and 200,000 fewer pounds of active ingredient that was used in 1993 statewide. These decreases indicate that almond growers are using roughly only a third of this pesticide than they were as recently as the early 1990s.

Highlighting this trend, the California Department of Pesticide Regulation's 2002 Progress Report reports on the success of the Almond Pest Management Alliance in providing research and education to over 1,000 orchardists and pest control advisors through projects in various counties, including Butte County. The Progress Report also documents that pesticide use on almonds statewide declined from 16 million pounds in 1998 to 10 million pounds in 2001, with steady decreases in the use of dormant-season organophosphate insecticides, including diazinon. According to the Progress Report, the steady decrease is for the most part due to the rise in integrated pest management – not to a rise or decline in crop value.

Finally, the Department of Pesticide Regulation has placed diazinon into re-evaluation, and as a result of this process is developing new label requirements for the use of diazinon that will better protect water quality from orchard dormant spray impacts. The Regional Board's DFSP fails to document or discuss any of the recent regulatory activities. As a result, the proposed basin plan amendment fails to include an implementation program that adequately considers these new regulatory activities.

2. *CPHA supports the DFSR's limitation of the Basin Plan Amendment to the mainstem of the Sacramento & Feather Rivers but is concerned that provision 9 of the implementation program defeats the Regional Board's intent.*

On page 14 of the DFSR, the Regional Board indicates that this basin plan amendment applies only to the mainstem Sacramento and Feather Rivers and that more information is necessary before preparing a similar amendment that would apply to tributaries of the Sacramento and Feather Rivers. CPHA supports this intent to prepare a site specific objective that applies only to the mainstems of the two major rivers. In order to apply this water quality objective to tributaries of the Sacramento and Feather Rivers and other waterbodies not specifically designated as part of the objective, the Regional Board needs to prepare a formal basin plan amendment that complies with all applicable provisions of the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), including determining if the water quality objective is achievable in the water body in question. The water quality objective as prepared in this instance can not be applied to upstream or to tributaries without complying with Porter-Cologne for each water body in question.

Unfortunately, the Regional Board's proposed language for the implementation plan undercuts its intent as expressed above. Specifically, provision 9 of the implementation program states that the Regional Water Board "may require additional reductions in diazinon levels to account for additive or synergistic toxicity effects or to protect beneficial uses in tributary waters." "Such requirements may include waste discharge requirements or effluent limitations based on pesticide or toxicity water quality objectives." In other words, the Regional Board may select numeric criteria more stringent than the proposed water quality objectives and enforce them on individual farmers without adopting the criteria as water quality objectives subject to Porter-Cologne. By utilizing alternative numeric criteria through this process, the Regional Board avoids having to adopt the criteria considering the factors required under section 13241 of Porter-Cologne.

Under section 13241, the Regional Board is required to adopt a water quality objective for the reasonable protection of beneficial uses. As part of the adoption process, the Regional Board must consider 1) past, present, and probable future beneficial uses of water; 2) environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto; 3) water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; 4) economic considerations; 5) the need for developing housing within the region; and, 6) the need to develop and use recycled water.

The Regional Board will attempt to argue that the pesticide and toxicity objectives are valid objectives adopted into the basin plan in accordance with the Porter-Cologne laws applicable at the time of adoption and therefore, no analysis is necessary pursuant to section 13241 of Porter-Cologne. However, the validity of these objectives has been called into question by a report that was recently released at the beginning of September. The report, *A Review of the Administrative Record for the Central Valley's Water Quality Control Plan 1975-1994*, documents the Central Valley Regional Board's basin planning

process and the adoption of water quality objectives into the basin plan. According to the report, the toxicity objective and the pesticide objective were not adopted in compliance with all provisions of Porter-Cologne. Consequently, the Regional Board's reliance on such objectives to utilize more stringent criteria than those proposed as part of this basin plan amendment is inappropriate and unfounded. Provision 9 of the implementation program must be deleted from the proposed amendment for it undercuts compliance with Porter-Cologne and renders the specificity of the proposed water quality objective as null and void should the Regional Board so desire.

3. *The prohibition against the direct or indirect discharge of diazinon if the water quality objective or the load allocations are exceeded in the previous year places an unfair burden on all growers.*

Under this prohibition, all growers are prohibited from discharging diazinon if there is an exceedance of either the water quality objective or load allocation regardless of the best management practices employed by the grower. In other words, if one bad actor spills diazinon into the Sacramento or Feather River and an exceedance of the water quality objective or the load allocation is triggered, the following year all growers must subject themselves to a conditional waiver, individual waste discharge requirements or general waste discharge requirements, regardless of the individual's intent (i.e. negligence or purposefulness) or use of best management practices.

4. *The implementation plan inappropriately requires compliance with load allocations as well as the water quality objective.*

The Clean Water Act states that load allocations "shall be established at a level necessary to implement the applicable water quality standards." 33 U.S.C. §1313 (d). Similarly, the federal regulations state, "TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS (water quality standards) with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 40 CFR §130.7 (c)(1). Neither the statute nor the regulations require compliance or enforcement of the load allocations against nonpoint source dischargers.<sup>1</sup>

In fact, the federal regulatory definition of load allocation provides good reason for not requiring strict compliance with nonpoint source load allocations. The definition states, "load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading." 40 CFR §130.2 (g). Accordingly, load allocations are usually seen as an information tool for the state's implementation plan.<sup>2</sup> As indicated by the Regional Board in its proposed language, allocations "can provide a

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<sup>1</sup> *Pronsolino v. Nastro* 291 F.3d 1123, 1140 (9<sup>th</sup> Circuit, 2002), "States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of §303 plans or providing for their enforcement."

<sup>2</sup> *Id.* at 1140, "The Garcia River TMDL thus serves as an informational tool for the creation of the state's implementation plan, independently – and explicitly – required by Congress."

framework for actions to be taken by the Regional Water Board for achieving pollutant reductions and attaining water quality objectives.” Proposed language to Chapter IV at page 17. Since load allocations are best estimates and an informational tool, it is inappropriate for the Regional Board to also require compliance with the load allocation. The legal purpose behind TMDLs and the resulting allocations is to achieve and maintain water quality standards, including water quality objectives. If the objective is being achieved, then the TMDL should be considered successful and perhaps no longer necessary. By requiring compliance with load allocations through the basin plan implementation chapter, the Regional Board is in effect creating a regulatory requirement based on a best estimate.

Such a regulatory requirement can not withstand the necessity and clarity requirements contained in California’s Administrative Procedures Act (APA). CA Govt. Code §11349 et seq. Under the APA, necessity means “the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record.” CA Govt. Code §11349 (a). In this case, the record shows that allocations provide a framework for achieving water quality objectives. It does not show that compliance with the allocation itself is necessary for achieving the proposed water quality objective. In fact, the record shows that the objective is generally achieved without load allocations at all. Consequently, the Regional Board has not made a case why compliance with the load allocation is a necessity.

Furthermore, the proposed basin plan amendment clearly violates the APA’s clarity requirement on two fronts. Clarity means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” CA Govt. Code §11349 (c). First, load allocations as defined by federal regulation are best estimates. The Regional Board proposes to use an equation to estimate the proper loading capacity and subsequent load allocation. This equation is an estimate that is not currently supported or tested by monitoring data to determine its validity. Growers subject to the basin plan amendment will be expected to comply with this estimated load allocation from adoption into perpetuity regardless if water quality objectives are achieved. This concept is not easily understood by growers directly impacted by the proposed regulation. In addition, the basin plan amendment includes the equations for loading capacity and load allocation. As currently written, the basin plan amendment is unclear since it does not explain the unit conversion factor, which is necessary to complete the equation. Consequently, the equation is not written or displayed so that it could be easily understood by growers who would be required to comply with the resulting load allocation. As a result, the basin plan amendment fails to meet the APA clarity requirements.

Since compliance with the load allocation is not legally required or a necessity, and since the basin plan amendment with regard to compliance with the load allocation is not clear, the provision should be deleted from the basin plan amendment.

5. *The goals of the monitoring program are inappropriate at this time and do not allow for Regional Board flexibility as other monitoring information becomes available.*

Porter-Cologne requires that a “description of surveillance to be undertaken to determine compliance with objectives” be included in a program of implementation for achieving water quality objectives. Porter-Cologne Act §13242. In this case, the Regional Board has gone well beyond the statutory requirement by requiring that any monitoring or reporting program designed to address pesticide runoff from orchards also be designed to determine compliance with waste load and load allocations; degree of implementation of management practices; effectiveness of management practices and strategies; impact of alternatives to diazinon; causes or contributes to toxicity impairment; and show that management practices are achieving the lowest pesticide levels technically and economically achievable. While many of the monitoring goals may produce worthwhile information, it is not an appropriate or necessary element to the Regional Board’s basin plan amendment.

The information required by these goals goes well beyond the necessity requirements as established in the APA. For this basin plan amendment, the only necessary monitoring information is that designed to determine compliance with the adopted water quality objectives for diazinon. All of the other information is not necessary for implementation of the water quality objectives and should be part of and consistent with other agricultural monitoring activities.

In summary, the basin plan amendment and associated TMDL contain sufficient flaws, both technically and legally. To remedy such deficiencies, the Regional Board should postpone any further actions until the basin plan amendment properly complies with all provisions of Porter-Cologne.

Thank you for the opportunity to comment. Please do not hesitate to contact myself or Kevin Keefer at (916) 446-3316 if you have any questions regarding our comments.

Sincerely,

Steve Beckley  
President/CEO